



**THE ATTORNEY GENERAL  
OF TEXAS**

August 4, 1989

**JIM MATTON  
ATTORNEY GENERAL**

Honorable Charles W. Chapman  
Criminal District Attorney  
Hays County Courthouse, Suite 208  
San Marcos, Texas 78666

LO-89-61

Dear Mr. Chapman,

You ask about the authority of an election recount supervisor to disregard voted ballots in an election recount.<sup>1</sup> You tell us that a 67-vote spread in an election for a Hays county commissioner resulted in a recount request by the losing candidate. Election recounts are governed by Title 13 of the Election Code. All references in this opinion are to the Election Code. "Recount" is defined by section 211.002(1) as the process conducted to verify the vote count in an election. As presiding officer of the local canvassing authority for the general election for state and county officers, the county judge serves as the recount supervisor. Elec. Code § 213.001. That officer is responsible for the management and supervision of the recount. Id. The supervisor appoints the recount committee and names a recount chairman. Id. § 213.002.

The recount committee chairman has the same authority as a presiding election judge on election day to determine whether particular ballots are to be counted and how a voter's markings on a ballot are to be interpreted. Id. § 213.006(a). The recount supervisor may exercise the chairman's authority when the supervisor is present during the recount. Id. § 213.002(c). Thus, a recount supervisor who is present during a recount possesses the authority of an election day presiding judge regarding the counting of ballots.

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1. After the recount was conducted, an election contest was filed and a new election was ordered. There is no pending litigation in this matter.

We understand that Hays County has adopted an electronic voting system using punch card ballots. The ballot cards used in such a voting system do not contain the names of individual candidates. Rather, the voter inserts the ballot card into a voting device containing a ballot-label on which the political parties' and candidates' names are printed. The voter punches holes in numbered positions on the ballot card that correspond to the political party or candidates appearing on the ballot label.

You tell us that the absentee ballots on which voters throughout the county cast a straight-party vote were mistakenly commingled after they were tallied on election day.<sup>2</sup> Also, there was no notation placed on the individual ballot cards to identify the election precinct in which the voters casting the ballots voted.<sup>3</sup> Thus, from the face of these straight-party ballots, it was not possible to know whether the ballots were cast in a precinct in which the office in question was to be voted on.

Under the circumstances you describe, the recount supervisor was confronted with over 1,000 ballots on which voters had indicated a preference for the nominees of either the Democratic Party or the Republican Party. It is agreed that many of these ballots were cast in precincts at which the office being recounted did not appear on the ballot. The voters residing in and casting ballots in the various election precincts located in other precincts were not eligible to vote for the office in question. Id. §§ 11.001, 11.003.

The overriding rule for counting ballots in this state is found in section 65.009(c), which states that a vote on an office "shall be counted if the voter's intent is clearly

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2. Section 1.005(20) defines a "straight-party vote" as "a vote by a single mark, punch, or other action by the voter for all the nominees of one political party and for no other candidates."

3. Senate Bill 1050, enacted by the 71st Legislature, effective September 1, 1989, requires the reporting of absentee votes by election precinct for each candidate and measure. This requirement will mandate the identification of absentee ballots by election precinct, eliminating the possibility that the problem encountered in the instant situation will recur.

ascertainable unless other law prohibits counting the vote." The recount chairman and the recount supervisor could not determine from the straight-party ballots whether the voters intended to vote for, or were eligible to vote for, either candidate for the office of county commissioner in question because the chairman and supervisor could not determine which ballots were cast in precincts in which the office appeared on the ballot.

Under the circumstances described, it is our opinion that the recount chairman and recount supervisor were compelled to disregard the straight-party ballots and had no authority to do otherwise.

A recount chairman or supervisor should disregard straight-party votes during a recount of a less than county-wide office when it is not possible to determine from the ballots that they were cast by voters residing in election precincts in which the office in question was to be voted on. Under such circumstances, it would not be possible for the recount chairman or recount supervisor to ascertain the voters' intent.

Very truly yours,



Karen C. Gladney  
Assistant Attorney General  
Opinion Committee

APPROVED: Sarah Woelk, Chief  
Letter Opinion Section

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